

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PENNY WAGGONER

Claimant

VS.

FIBERGLASS ENGINEERING, INC.

Respondent

AND

CIGNA INSURANCE COMPANY

Insurance Carrier

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Docket No. 199,827

ORDER

Claimant appealed the August 27, 1997, Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument by telephone conference on January 28, 1998.

APPEARANCES

Claimant appeared by her attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John I. O'Connor of Pittsburg, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record listed in the Administrative Law Judge's Award. However, the first two depositions listed, Marvin L. Johnson and Terrance C. Tisdale, M.D., were listed by mistake. These depositions were not considered as part of the record before the Administrative Law Judge and will not be considered as part of the record before the Appeals Board. Also, the Administrative Law Judge's record failed to list the transcript of continuation of the Regular Hearing by deposition taken on April 4, 1997.

STIPULATIONS

The Appeals Board adopts the stipulations listed in the Administrative Law Judge's Award.

ISSUES

The Administrative Law Judge awarded claimant a work disability of 32 percent. Claimant contends she has proven a much higher work disability of 64 percent. Respondent, on the other hand, contends claimant has failed to prove either a work disability or permanent functional impairment. Nature and extent of claimant's disability is the only issue for Appeals Board review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Respondent manufactures Cobalt boats. Claimant suffered bilateral injuries to her wrists and hands while employed in respondent's final assembly department as a glass worker. Claimant testified she worked from 1980 to 1981 and then from 1988 through March 8, 1995, as a glass worker. Claimant described her glass worker duties as requiring her to use both of her hands repetitively to finish defects in the fiberglass of the boats. The job required claimant to continuously use power tools such as routers, grinders, sanders, and buffers. Claimant also painted the repaired defects with a handheld, air-powered paint gun.

Claimant testified she started having symptoms in both of her wrists and hands while using various air tools in approximately 1993. Claimant notified the respondent she was having those symptoms and the respondent provided braces for her to use while working. Claimant testified, although she used the braces, her symptoms worsened. Finally, on March 8, 1995, she had to leave work because she could no longer perform her job duties. The next day, claimant was sent to the respondent's doctor, F. Allen Moorehead, Jr., M.D., located in Neodesha, Kansas.

Dr. Moorehead diagnosed claimant with probable bilateral carpal tunnel syndrome, placed her in night splints, prescribed pain medication, and took her off work. The doctor referred claimant for nerve conduction studies which were negative for compression neuropathy. After the normal nerve conduction studies, Dr. Moorehead diagnosed claimant with myofascitis and tendonitis. The doctor also referred claimant for a second opinion and consultation to orthopedic surgeon, Harry A. Morris, M.D., who is a specialist in hand surgery in Wichita, Kansas.

Dr. Morris first saw claimant on March 29, 1995. After examining the claimant and noting the negative nerve conduction studies, Dr. Morris diagnosed bilateral wrist tendonitis. He recommended continued conservative treatment with emphasis on modification of claimant's activities including no vibratory stress to her hands as well as no repetitive motion of her hands. Based on the description that claimant gave Dr. Morris of her job duties, Dr. Morris believed claimant would, unfortunately, be required to change jobs.

Dr. Moorehead released claimant to return to work in May of 1995 with the following permanent restrictions: lifting limited to 25 pounds; varying of job tasks; and avoiding use of vibratory tools. Respondent returned claimant to work on May 8, 1995, by placing her in a job in shipping which required her to pull parts, package the parts, and do some work on the computer. This was a temporary job which lasted six months and was within claimant's permanent restrictions.

Respondent then transferred claimant to a job in its warehouse identified as a material handler. That job required claimant to pull parts and deliver the parts to the assembly line. Some of those job duties exceeded claimant's weight-lifting restriction of 25 pounds. The material handler job only lasted two months as the claimant was taking the place of an employee on a leave of absence. After the employee returned, the respondent offered claimant the opportunity to apply for four production jobs. But those were all outside of claimant's permanent work restrictions. Claimant did not apply for those jobs and respondent laid claimant off on January 19, 1996. Respondent, after layoff, did not offer claimant any further accommodated employment.

The last time claimant was seen by Dr. Morris was on October 4, 1995. Claimant had returned to see him on September 27, 1995, because she again was having symptoms in her wrists and hands. At that time, Dr. Morris had her undergo another nerve conduction study. This test was also negative for compression neuropathy. Dr. Morris determined at that time claimant had met maximum medical improvement and released her with no permanent functional impairment rating but with permanent restrictions. Dr. Morris explained that claimant's condition did not constitute a permanent functional impairment because working within the permanent restrictions would prevent her from further injury and any need for additional medical treatment.

The final time Dr. Moorehead examined and treated claimant was August 30, 1995. Dr. Moorehead received Dr. Morris' final evaluation of claimant's physical condition in a letter dated October 4, 1995. The doctor then reported to the respondent by letter to James M. Casper, respondent's safety director, that Dr. Morris had determined claimant had met maximum medical improvement and she had no permanent impairment. Dr. Moorehead, however, advised the respondent that claimant should remain working within the permanent restrictions previously prescribed. As stated, this recommendation was not followed by respondent after January 19, 1996, when the temporary material handler job ended.

Claimant testified, that following her layoff, she received unemployment benefits for approximately three months. At the regular hearing held on March 26, 1997, claimant testified she was actively looking for work but she had not worked since her layoff. Respondent discovered, however, that claimant was working as a bartender at the Eagles Club in Neodesha, Kansas.

Following this discovery, claimant testified at a deposition on June 23, 1997. Claimant admitted she was working for the Eagles Club at the time she testified on March 26, 1997. She explained she neglected to testify that she was working as a bartender at the Eagles Club because she was being paid in cash. She explained she did not want to get the other bartenders involved. Claimant's best recollection as to the date she started working for the Eagles Club was sometime in November or December of 1996. The respondent took the deposition of John Glasgow, manager of the Eagles Club. Mr. Glasgow testified claimant had started working sometime in July of 1996. He further testified claimant was earning \$5 per hour and working 43 hours per week or \$215 a week.

The respondent presented two arguments against the Administrative Law Judge's work disability Award. First, the respondent contends claimant is not eligible for work disability because she returned to work at a comparable wage for eight months after her work-related injury. Respondent, without citing any authority, argues that since claimant worked for respondent for eight months post-injury, she is not entitled to a work disability. The Appeals Board finds that an injured worker who returns to work at an accommodated job following a work-related injury and is subsequently laid off, either because of an economic layoff or because the employer can no longer accommodate her restrictions, is entitled to a work disability. See Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

Second, the respondent asserts claimant voluntarily took herself out of the labor market by not making a good faith effort to find other employment. Furthermore, respondent argues claimant was offered other employment by Cessna at its new plant in Independence, Kansas, and for no good reason refused the offer. The Appeals Board also rejects these arguments. Claimant testified she received unemployment benefits for approximately three months following her layoff and then continued to apply for jobs without success. Finally, claimant obtained the bartender job at the Eagles Club. Claimant admits she applied for employment with Cessna and was offered a job. But claimant established through her testimony that the job offered by Cessna was outside her restrictions. It was a painter job which would have required her to use both of her hands repetitively and to hold an air-operated paint gun in her hand the majority of the time.

The Appeals Board concludes the record as a whole supports the Administrative Law Judge's decision that claimant is entitled to a work disability. The respondent accommodated the claimant for eight months and then laid claimant off because they could not continue to accommodate her work restrictions. After layoff, claimant has never been offered a job within her restrictions at 90 percent of her comparable wage. The record

before the Appeals Board indicates claimant earned \$452.55 per week pre-injury and \$215 per week post-injury. Therefore, the wage loss component of the work disability test contained in K.S.A. 44-510(e) equals 52 percent.

The other component of the work disability test is determined by claimant's loss of work task performing ability during the 15-year period preceding the accident as expressed by the physician. K.S.A. 44-510e(a).

Three physicians testified in this case on the issues of claimant's loss of work task performing ability and claimant's permanent functional impairment. All of the physicians were requested to review a list of claimant's work tasks that was developed by vocational expert Karen Terrill. The work tasks were listed by job and included the period of time claimant performed that job. Each individual work task was then described and the percentage of time claimant performed each work task was quantified. A large portion of the record in this case was devoted to scrutinizing claimant's work task list developed by Karen Terrill. Claimant, at the continuation of the regular hearing, was extensively examined and cross-examined in regard to the accuracy of the work task list. Respondent's representative, safety director James M. Casper, also testified at length concerning the work task list and his opinion as to the accuracy of the list. Nevertheless, both the respondent and the claimant offered into evidence, at all three of the physicians depositions, the work task list as originally developed by Karen Terrill. There was no objection by either party at any time when this original work task list was offered.

Dr. Morris, the orthopedic surgeon who treated the claimant, testified and expressed his opinion on claimant's functional impairment rating and claimant's loss of work task performing ability. Although Dr. Morris placed permanent restrictions on claimant's work activities, Dr. Morris found claimant had not suffered a permanent impairment as a result of her injuries. The doctor believed the permanent restrictions he had prescribed would prevent her condition from developing into a problem that would require further treatment or developing into a permanent impairment. Dr. Morris' permanent restrictions were for claimant to vary her work tasks, to avoid performing continually repetitious activity, and to avoid working with vibratory tools.

The doctor was asked to review claimant's work task list and to identify the work tasks claimant could no longer perform because of the permanent restrictions. Dr. Morris identified 4 of the work tasks as no and 1 he identified with a question mark. One of the work tasks that was identified with a no contained an asterisk which was identified as a duplicate work task. The first work task Dr. Morris identified with a no had the same description as the work task identified with an asterisk. Therefore, the Appeals Board agrees only one work task should be counted, not two. The Appeals Board also finds the work tasks identified by Dr. Morris with a question mark is a work task that claimant cannot perform. Claimant's attorney, on cross-examination, informed Dr. Morris that if the work task required claimant to use power tools, the claimant testified she was required to use the power tools anywhere from 94 to 98 percent of the time. After obtaining that

information, the doctor agreed claimant could not perform any of the work tasks that required her to use power tools. The work task identified by the doctor with a question mark required the use of power tools.

Michael P. Estivo, D.O., examined and evaluated claimant, at her attorney's request, on February 26, 1996. Dr. Estivo is an orthopedic surgeon in Wichita, Kansas, who is not board certified but is board eligible. Dr. Estivo diagnosed claimant with bilateral wrist tendonitis caused by the repetitive, hand-intensive job duties performed while working for the respondent. Dr. Estivo believed claimant had met maximum medical improvement and prescribed splints to be worn while performing work activities.

After being examined by Dr. Estivo, claimant requested a preliminary hearing. The preliminary hearing was held on June 4, 1996. Claimant asked the Administrative Law Judge for a change in her authorized treating physician to Dr. Estivo. The Administrative Law Judge ordered claimant to return to see Dr. Estivo for a court-ordered functional capacity evaluation (FCE) and then to determine from the FCE claimant's permanent work restrictions.

Claimant returned to see Dr. Estivo on July 19, 1996. He ordered an FCE which was conducted by Wichita Orthopedic Rehab Center on July 26, 1996. Claimant again returned to Dr. Estivo on July 31, 1996. At that time, Dr. Estivo opined claimant had suffered a 5 percent functional impairment to her left and right upper extremities. Those functional impairment ratings were combined for a 5 percent whole body functional impairment. The AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition was utilized by Dr. Estivo in making his functional impairment opinion. The doctor was also given the opportunity to review claimant's work task list that had been developed by Karen Terrill. The doctor also reviewed claimant's regular hearing testimony that verified the work task list. Based on the FCE's permanent restrictions and Dr. Estivo's additional restriction against the use of vibratory tools, Dr. Estivo found claimant could not perform 13 of the 29 work tasks.

Claimant's attorney also arranged for claimant to be examined and evaluated by Daniel D. Zimmerman, M.D., located in Westwood, Kansas. Dr. Zimmerman's medical specialty is internal medicine. He is board eligible and not board certified in that specialty. Dr. Zimmerman's practice is devoted 25 percent to caring for patients, 25 percent to performing personal injury or worker's compensation evaluations, and the remaining 50 percent is devoted to performing services as a medical consultant for the social security administration and district medical director for the labor department. Dr. Zimmerman saw claimant once on August 12, 1996. The doctor diagnosed claimant with chronic bilateral wrist tendonitis. He attributed the tendonitis condition to claimant's work activities while she was employed by the respondent. In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Zimmerman assessed claimant with a permanent functional impairment of the right upper extremity of 12 percent and of the left upper extremity of 7 percent. The doctor converted those upper extremity

ratings to whole body ratings and combined those whole body ratings utilizing the Combined Value Chart to an 11 percent whole body rating. Dr. Zimmerman recommended claimant be permanently restricted from using pneumatic tools or vibratory equipment; lifting on an occasional basis over 20 pounds; lifting on a frequent basis over 10 pounds; and avoid frequent flexion, extension, twisting, torquing, and hammering activities. The doctor reviewed claimant's work task list developed by vocational expert Karen Terrill. He opined, based on the permanent restrictions that he had placed on the claimant, that she could no longer perform 20 of the 29 listed work tasks.

The Administrative Law Judge found claimant had lost 13 percent of her work task performing ability based on, in his opinion, the more credible and accurate opinion of claimant's treating physician, Dr. Morris. The Administrative Law Judge did not consider either Dr. Estivo's or Dr. Zimmerman's opinion on claimant's loss of ability to perform work tasks. The Appeals Board concludes equal weight should be given to Dr. Morris' and Dr. Estivo's opinion on claimant's loss of ability to perform work tasks. But Dr. Zimmerman's opinion should not be given any weight in the determination of claimant's work task loss. Both Dr. Estivo and Dr. Zimmerman were initially retained by the claimant to examine and evaluate her injuries. Consequently, the Appeals Board finds it would be unreasonable to give equal weight to both of their opinions. Moreover, Dr. Zimmerman's work task loss opinion is out of line with the opinions of Dr. Estivo and Dr. Morris. The Appeals Board finds that Dr. Estivo's and Dr. Morris' opinions on claimant's work task loss are more consistent with the nature and severity of claimant's injuries.

The Administrative Law Judge's finding that claimant had lost 13 percent of her work task performing ability must have been determined by dividing Dr. Morris' opinion that claimant lost 4 work tasks by the 29 work tasks listed. The list of work tasks that claimant performed in the 15-year period preceding the date of her accident are identified by Karen Terrill by both the period of time the claimant performed each particular job and the percentage of time claimant performed each individual work task. Claimant was employed for 11.17 of the 15 years next preceding her injury. She performed the jobs of assembler and customer service for the respondent for 7 out of the total 11.17 years she worked. Those jobs have duplicative work tasks. Accordingly, the work tasks claimant lost during that 7-year period should be given more weight than the work tasks claimant lost during a shorter period of time. If claimant's work task loss is determined by a straight average, then claimant would not receive the full impact that her work-related injuries had on her ability to do the work tasks she performed before the injury. Therefore, the Appeals Board finds claimant's work task loss should be determined by weighting the period of time claimant performed a particular job together with the percentage assigned to the individual work tasks that claimant can no longer perform. Utilizing this time-weighted method, the Appeals Board finds claimant's work task loss as determined by Dr. Morris would be 44 percent and the work task loss as determined by Dr. Estivo would be 62 percent. Giving both of these opinions equal weight, the Appeals Board finds claimant lost 53 percent of her ability to perform work tasks.

K.S.A. 44-510e(a) requires both the 53 percent work task loss and the 52 percent wage loss be given equal weight in arriving at a work disability. Accordingly, the Appeals Board finds claimant is entitled to permanent partial disability benefits based on a work disability in the amount of 52.5 percent.

Both the claimant and respondent point out that claimant returned to an accommodated position at comparable wage after she was released to return to work on May 8, 1995. She worked at this accommodated job until she was laid off on January 19, 1996. Therefore, during this period she was not eligible for a work disability, but would be eligible for any permanent functional impairment. The Appeals Board also finds the medical opinions of both Dr. Morris and Dr. Estivo should be considered on the issue of whether claimant suffered a functional impairment. Dr. Morris testified, that although he placed permanent restrictions on claimant's work activities, he did not believe she suffered any permanent functional impairment. On the other hand, Dr. Estivo did express an opinion on claimant's functional impairment but based this opinion on the AMA Guides Fourth Edition instead of the AMA Guides Third Edition (Revised). The Third Edition of the AMA Guides is the one required to be used for the date of claimant's accident. The Appeals Board concludes claimant failed to prove she suffered a permanent functional impairment as the result of her work injuries. Proof of permanent functional impairment, however, is not essential for a claimant to receive compensation based on a work disability. See, McLaughlin v. Excel Corporation, 14 Kan. App. 2d 44, 783 P.2d 348, rev. denied 245 Kan. 784 (1989).

The Appeals Board finds, since functional impairment has not been proven, claimant's award of permanent partial general disability benefits based on work disability will not start until January 20, 1996, the day following claimant's last day worked.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated August 27, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Penny Waggoner, and against the respondent, Fiberglass Engineering, Inc., and its insurance carrier, CIGNA Insurance Company, for an accidental injury which occurred on March 8, 1995, and based upon an average weekly wage of \$452.55.

Claimant is entitled to 8.14 weeks of temporary total disability compensation at the rate of \$301.72 per week or \$2,456.00. Commencing January 20, 1996, claimant is entitled to 217.88 weeks at the rate of \$301.72 per week or \$65,738.75, for a 52.5% permanent partial general disability, making a total award of \$68,194.75.

As of March 19, 1998, there is due and owing claimant 8.14 weeks of temporary total disability compensation at the rate of \$301.72 per week or \$2,456.00, followed by 112.71 weeks of permanent partial compensation at the rate of \$301.72 per week in the sum of \$34,006.86 for a total of \$36,462.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$31,731.89 is to be paid for 105.17 weeks at the rate of \$301.72 per week, until fully paid or further order of the Director.

All remaining orders contained in the Administrative Law Judge's Award are adopted by the Appeals Board as if specifically set forth in this order.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
John I. O'Connor, Pittsburg, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director